No. 83-178

# In the Supreme Court of the United States

OCTOBER TERM, 1983

THE WESTERN COMPANY OF NORTH AMERICA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Secretary of the Treasury had the authority to amend the Treasury Regulations interpreting the Manufacturers and Retailers Excise Tax, 26 C.F.R. 48.4061(a)-1(d)(1), to define a "highway vehicle" as "any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions," in place of an earlier definition that excluded from taxation those vehicles that were "primarily designed" or predominantly adapted for use as nonhighway vehicles.

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### OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 15-39) is reported at 699 F.2d 264.

### JURISDICTION

The judgment of the court of appeals was entered on March 4, 1983, and the court of appeals denied rehearing on May 5, 1983. The petition was filed on August 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

The petitioner is a corporation which is engaged in providing specialized oilfield services required in drilling and operating oil and gas wells (Pet. App. 16). These services consist primarily of pumping cement, acid, or a mixture of

sand and water at high pressure into the well to be serviced. The petitioner mounts its specialized well servicing equipment on a truck chassis or trailer, so that it can be driven to the job site and connected to the well to be serviced by means of high pressure pipe (Pet. App. 16). Since the wells serviced by the petitioner's crews are often remote from its district offices, and are also frequently located some distance from the nearest improved road, the petitioner's vehicles are designed to be able to travel at sustained highway speeds as well as to be able to traverse difficult terrain and unimproved private roads (Pet. App. 16-17). In designing vehicles to meet the requirements of the petitioner's business, its engineers frequently specify features and equipment, such as high traction tires, multi-speed transmissions, and extra frame supports, which are not normally needed on vehicles designed exclusively for highway use, but which enable the vehicles to satisfy the legal and practical requirements of highway driving as well as to meet the demands of off-road service (Pet. App. 17-18).

The issue presented in the case is whether the petitioner's vehicles are "highway vehicles" subject to the special fuels and highway use taxes imposed by Sections 4041 and 4481, Internal Revenue Code of 1954 (26 U.S.C.), during the taxable periods 1971 through 1977. Prior to January 13, 1977, the regulation governing the application of the special fuels excise tax stated that the tax was payable on any fuel used in a vehicle "of the type used for transportation on the highways." Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code), Section 48.4041-7(b), T.D. 6505, 1960-2 Cum. Bull. 283, 291. The standard for the imposition of the highway use tax was similar, although stated in the negative; *i.e.*, a vehicle was taxable unless it was "of a type designed and manufactured for a purpose other than highway transportation." Treasury Regulations on Excise Tax on Use of Certain Highway Motor Vehicles

(1954 Code), Section 41.4482(a)-1, T.D. 6216, 1956-2 Cum. Bull. 895, 900-901. See also *Big Three Industrial Gas & Equipment Co.* v. *United States*, 329 F. Supp. 1273, 1274, 1277-1278 (S.D. Tex. 1971), aff'd *per curiam*, 459 F.2d 1042 (5th Cir. 1972) (interpreting the parallel definition of a highway vehicle contained in Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code), Section 48.4061(a)-1(d), T.D. 6648, 1963-1 Cum. Bull. 197, 199-200, issued under the manufacturers excise tax on highway motor vehicles, Section 4061, Internal Revenue Code of 1954 (26 U.S.C.)).[1]

On January 13, 1977, the Secretary of the Treasury amended the definition of a highway vehicle for purposes of all three highway-related excise taxes. Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code) (26 C.F.R.), Section 48.4061(a)-1(d)(1). The new regulation states that a "highway vehicle" is "any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions." This definition, which appears in the regulations issued under the manufacturers excise tax, was incorporated by reference in the regulations issued under the special fuels and highway use excise taxes at issue here. Treasury Regulations on Excise Tax on Use of Certain Highway Motor Vehicles (1954 Code) (26 C.F.R.) Section 41.4482(a)-1(c); Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code) (26 C.F.R.) Section 48.4041-7(b)(2).

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[1]The subdivision of the pre-1977 regulation which the court construed in *Big Three, supra*, 329 F. Supp. at 1274, stated that the tax status of a vehicle depended on whether it was "designed for highway use." Treasury Regulations, *supra*, Section 48.4061(a)-1(d), T.D. 6648, 1963-1 Cum. Bull. 197, 199-200. This terminology led to the "primary design" test developed by the *Big Three* court. 329 F. Supp. at 1277-1278.

This case was tried to a jury and was submitted for a special verdict (Pet. App. 3-12). The questions asked on the special verdict form required the jury first to evaluate each of nine categories of petitioner's vehicles under the "primary design" test developed by the court in *Big Three, supra,* under the pre-1977 regulations, and then to make an independent evaluation of each of the same categories under the 1977 Treasury regulation, *supra.* The jury found that under the *Big Three* test all of petitioner's vehicles were highway vehicles, except two categories of trucks and trailers. The jury further found that, under the test prescribed in the 1977 regulation, all of petitioner's vehicles were highway vehicles (Pet. App. 5-12). The district court, in an apparent but unstated determination that the 1977 regulation was invalid because the *Big Three* test had attained the force of positive law, ordered a refund of the excise taxes paid on the petitioner's equipment transport vehicles for all years in issue, including 1977 (Pet. App. 20).

The court of appeals reversed as to the 1977 regulation, holding that nothing in the sparse legislative history of the highway-related excise taxes, including the special fuel and highway use taxes at issue in this case, indicated that Congress intended to adopt the "primary design" test (Pet. App. 21). The court noted, moreover, that while the definition of "highway vehicle" under the manufacturers excise tax had relied on the "primary design" test, the Department of the Treasury and the courts had developed a broader definition of "highway vehicle" under the special fuel and highway use

taxes at issue here (Pet. App. 21-29).[2] Accordingly, the court of appeals rejected the petitioner's contention that the "primary design" test had achieved the force of positive law "beyond all but legislative modification," and sustained the validity of the 1977 Treasury regulation (Pet. App. 21, 29-30).[3]

## ARGUMENT

The holding of the court of appeals sustaining the 1977 Treasury regulation was correct. This Court has twice recently reaffirmed the well-established principle that Treasury Regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979); *Fulman* v. *United States*, 434 U.S. 528, 533 (1978). See also *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948). The regulation at issue here is neither unreasonable nor inconsistent with the Internal Revenue Code. Further review by this Court, therefore, is not warranted.

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[2]With respect to the special fuels tax, the pre-1977 regulation stated that the highway-worthiness of a vehicle's design, apart from its incidental use to carry specialized equipment to off-highway destinations, rendered the vehicle subject to taxation (Pet. App. 23). See Treasury Regulations, *supra*, Section 48.4041-7(b), T.D. 6505, 1960-2 Cum. Bull. 283, 291. With respect to the highway use tax, the pre-1977 Regulations adopted essentially the same test as that used for the special fuels tax (Pet. App. 24-25). See Treasury Regulations, *supra*, Section 41.4482(a)-1, T.D. 6216, 1956-2 Cum. Bull. 895, 900-901. Thus, the pre-1977 interpretative history of Code Sections 4041(a) and 4481(a) shows that the Internal Revenue Service adhered to a construction of the statutes that imposed a tax on vehicles designed to carry and capable of carrying specialized loads both over the public highways and off-road (Pet. App. 24).

[3]The court of appeals also held that the district court did not abuse its discretion in refusing to grant a hearing, as requested by the government, to resolve a post-verdict dispute concerning the classification of some of the petitioner's vehicles (Pet. App. 32-33).

The petitioner contends (Pet. 7-12) that the above principle of judicial deference does not apply to the regulation at issue in this case because it is not a contemporaneous construction of the excise tax statutes it interprets, but rather constitutes a departure from prior administrative and judicial constructions that have received implied congressional sanction. However, as this Court pointed out in *National Muffler Dealers Assn.* v. *United States, supra*, 440 U.S. at 485, "[c]ontemporaneity * * * is only one of many considerations that counsel courts to defer to the administrative interpretation of a statute."

The regulation challenged by petitioner provides the foundation for a uniform test for the definition of a "highway vehicle" for purposes of all three highway-related excise taxes. A regulation such as this one, which resolves prior inconsistencies in the treatment of the same subject matter under similar or related statutes, must often be developed in light of administrative and judicial experience under the several statutory schemes involved. The promulgation of a regulation that reconciles prior administrative or judicial interpretations of congressional intent is a classical exercise of the Commissioner's rule-making power, and a regulation adopted in furtherance of this goal is entitled to the same judicial deference as a contemporaneous construction of the statute.[4] *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 100-101 (1939); *National Muffler Dealers Assn.* v. *United States, supra*, 440 U.S. at 485-486.

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[4] *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 25-32 (1982), cited by the petitioner (Pet. 12), does not support its contention that the regulation in issue in this case is invalid. In that case, this Court pointed out that the relevant statutory language and its legislative history directly supported the taxpayer's contention and tended to show that the regulation there challenged was not a reasonable interpretation of the statute. But, as the court of appeals pointed out (Pet. App. 29-30), the petitioner has conceded that the highway-related excise tax statutes

Petitioner also contends (Pet. 15-16) that the decision of the court of appeals conflicts with the decision of the Court of Claims in *International Business Machines* v. *United States*, 343 F.2d 914 (1965), cert. denied, 382 U.S. 1028 (1966). This contention is without merit. As the court of appeals pointed out (Pet. App. 32), in the *IBM* case the plaintiff had made every reasonable effort to obtain its own favorable private ruling similar to that favoring a competitor, whereas here the petitioner never sought a ruling concerning the tax status of its vehicles. Thus, whatever other consequences might result from a letter ruling that had been provided to the manufacturer of petitioner's vehicles, petitioner cannot claim that taxation of its equipment is unfair.[5]

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and the legislative history surrounding their enactment and reenactments provide no evidence that Congress ever approved the "primary use" test.

The petition also alleges (Pet. 14-15) that the decision in this case conflicts with the decision of the Second Circuit in *Allied Bitumens, Inc.* v. *United States*, 485 F.2d 1237 (1973), and with the decision of the Tenth Circuit in *Stafford Well Service, Inc.* v. *United States*, 35 A.F.T.R. 2d 1698 (Mar. 5, 1973). These cases, however, were decided under the law in effect prior to the 1977 regulation at issue here.

[5]The Internal Revenue Code expressly provides that letter rulings may not be used or cited as precedent. 26 U.S.C. 6110(j)(3). Before this statutory provision became effective there was an identical well-established judicial rule precluding reliance on such private rulings by any taxpayer other than the taxpayer to whom the ruling was issued. *Shakespeare Co.* v. *United States*, 389 F.2d 772, 777 (Ct. Cl. 1968).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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